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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
09/163,778	09/30/98	LEPINE	A IAM498PA

IM22/0606  
KILLWORTH GOTTMAN HAGAN & SCHAEFF  
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DAYTON OH 45402-2023

EXAMINER

DUBOIS, P

ART UNIT	PAPER NUMBER
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1761

DATE MAILED:

*9*  
06/06/00

**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**

# Office Action Summary

Application No.

09/163,778

Applicant(s)

LEPINE, ALLAN

Examiner

DuBois

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

## Status

- 1) ☐ Responsive to communication(s) filed on 25 March 2000.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- a) ☐ All b) ☐ Some \* c) ☐ None of the CERTIFIED copies of the priority documents have been:
1. ☐ received.
2. ☐ received in Application No. (Series Code / Serial Number) \_\_\_\_\_.
3. ☐ received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. & 119(e).

## Attachment(s)

- 15) ☐ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6.
- 18) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other: \_\_\_\_\_.

**DETAILED ACTION**

**FINAL**

***Claim Rejections - 35 USC § 103***

I. Claims 1, 3-5 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oftedal (Lactation in the Dog: Milk Composition and Intake by Puppies, pg. 807) in view of Kakade (U.S. Patent 4,614,653).

Oftedal in view of Kakade is being applied for the reasons noted in the previous Office Action.

II. Claims 6 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oftedal in view of Kakade as applied to claim 1, 3-5 and 9 above, and further in view of Gil et al (U.S. Patent 5,709,888).

Oftedal, Kakade and Gil are being applied for the reasons noted in the previous Office Action.

III. Claim 7 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oftedal in view of Kakade and further in view of Gil as applied to claims 6 and 14 above, and further in view of Traitler et al (U.S. Patent 4,938,984).

Oftedal in view of Kakade and further in view of Gil and Traitler are being applied for the reasons noted in the previous Office Action.

IV. Claim 8 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oftedal in view of Kakade as applied to claims 1, 3-5 and 9 above, and further in view of Kinumaki et al (U.S. Patent 4,294,856).

Oftedal in view of Kakade is being applied for the reasons noted in the previous Office Action.

V. Claim 10 and 13 rejected under 35 U.S.C. 103(a) as being unpatentable over Oftedal in view of Kakade as applied to claim 1, 3-5 and 9 above, and further in view of Fujimori (U.S. Patent 5,294,458).

Oftedal, Kakade and Fujimori are being applied for the reasons noted in the previous Office Action.

***In re Levin***

Finally, Applicants' attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered on point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

***Double Patenting***

**U.S. Patent 5,792,501**

The Double Patenting rejection in the previous Office Action in view of U.S. Patent 5,792,501 is still maintained for the reasons noted above and the reasons outlined in the Response to Arguments.

**U.S. Patent 5,882,714**

The Double Patenting rejection in the previous Office Action in view of U.S. Patent 5,882,714 is still maintained for the reasons noted above and the reasons outlined in the

***Terminal Disclaimer***

The terminal disclaimer filed on March 20, 2000 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent Application Number 09/362,401 has been reviewed and is accepted. The terminal disclaimer has been recorded.

***Response to Arguments***

Applicant's arguments filed on March 20, 2000 have been fully considered but they are not persuasive.

The applicant argues that the claimed invention is designed for puppies and therefore is distinguished over the prior art. However, the prior art references are all directed to nutritional components for animals. The claimed invention would be obvious in light of the prior art to one of ordinary skill in the art at the time of the invention. Furthermore, the use of the product, whether it is for pigs, cats or other mammals, is merely an intended use.

It is also noted that Kakade clearly teaches that the milk replacer can be used for the feeding of monogastric animals. Canines fall clearly within this spectrum. Furthermore, Oftedal clearly teaches the composition and intake of milk by mother-reared puppies (Lactation in the Dog: Milk Composition and Intake by Puppies, abstract). It would have been obvious to one of ordinary skill in the art at the time of the invention to simulate the milk taught by Oftedal.

The claimed invention is not structurally different from the prior art. Gil, Traitler, Kinumaki and Fujimori are all directed to the nutritional benefit of animals. The claimed invention is a combination of known nutritional supplements for animals that are taught by Gil, Traitler, Kinumaki and Fujimori. As noted in the previous Office Action, Gil, Traitler, Kinumaki and Fujimori teach that these supplements aid in the development of animals. Thus, it would have been obvious to one of ordinary skill in the art to apply the known nutritional supplements to a formula for animals such as puppies, dogs or any other pet or farm animal.

The applicant argues that the claimed invention is designed specifically for puppies. In response to applicant's argument that the product is designed for puppies, a

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recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). As noted above the claimed invention is not structurally different and incorporates known nutritional additives. Thus, the claimed invention is not distinguished from the prior art.

### ***Conclusion***


1. No claim is allowed.
2. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Philip DuBois whose telephone number is (703) 305-0508. The examiner can normally be reached on Monday through Friday from 8:00 to 5:30. The examiner is not in the office the second and fourth Fridays of each month.
4. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gabrielle Brouillette, can be reached on (703)-308-3535. The fax phone number for this Group is (703)-305-3602.
5. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.

Philip A. DuBois  
06/05/00

  
**MILTON CANO**  
**PRIMARY EXAMINER**  
GHE 1761  
6/5/00